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No. 03-407

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE; AND JUDGE LYNDA L. HEATHSCOTT

Petitioners,

v.

JUDGE DENNIS C. KOLENDA,

Respondent,

JOHN CLIFFORD TESMER, CHARLES CARTER, ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND MICHAEL D. VOGLER

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF IOWA, ALABAMA, FLORIDA, HAWAI'I, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MARYLAND, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VIRGINIA AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Do attorneys have third-party standing on behalf of potential future criminal defendants to challenge, in federal court, a state procedural rule limiting the right to court-appointed appellate counsel, where *Younger* abstention bars a federal-court challenge by the defendants themselves?

2. Does the Fourteenth Amendment guarantee a right to an appointed appellate attorney in a discretionary first appeal of an indigent criminal defendant convicted by a guilty plea, even when other state procedures ensure a knowing and intelligent waiver of appellate counsel?

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INTERESTS OF *AMICI CURIAE*

This case raises fundamental questions about the States' ability to organize and order their criminal justice systems as their citizens think best, free from unreasonable—and premature—interference by federal courts. *Amici* States therefore have a strong interest in both of the questions presented in this case, as the Sixth Circuit's ruling on each issue poses a threat to that fundamental aspect of state sovereignty.

As to the preliminary question posed by the Sixth Circuit's ruling, *amici* States have a strong interest in whether and under what circumstances an attorney, acting in his own right, has third-party standing to challenge a State's rules of criminal procedure on behalf of criminal defendants the attorney *might* represent at some point in the future. The Sixth Circuit's ruling that criminal-defense attorneys have third-party standing to assert such challenges poses a substantial threat to various federalism doctrines, such as *Younger* abstention, that are designed to provide breathing space to the States. Indeed, *amici* believe that the Sixth Circuit's ruling will make *Younger* abstention meaningless because, even if federal courts abstain from considering claims brought by criminal defendants themselves, those same courts will grant third-party standing to attorneys to litigate the same issues.

Amici have an equally strong interest in the merits of the constitutional question presented, which is, at bottom, whether a rule of criminal procedure that conditions a guilty plea on a criminal defendant's agreement to waive certain post-conviction procedural rights can be held facially unconstitutional. Although none of the *amici* have adopted rules like the specific Michigan rule at issue here, these States have an interest in the broader constitutional question of what measures they may take in furtherance of their strong interest in the finality of guilty pleas, and the related question of when

those measures may be subject to a facial challenge. See *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). The Sixth Circuit's ruling undermines the States' interest in finality. At the same time, it substantially erodes two settled principles: first, that a criminal defendant can waive his constitutional rights so long as he does so with his "eyes open" (*Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942)), and second, that a law can be held facially unconstitutional only when it is incapable of being applied in a constitutional manner. *E.g.*, *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). These precedents have enormous practical implications for the administration of *amici*'s criminal justice systems.

SUMMARY OF ARGUMENT

I. The Sixth Circuit erred in conferring third-party standing on respondents. First, respondents failed to demonstrate that they have a personal interest in this case sufficient to satisfy the case or controversy requirement of Article III. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (plurality opinion); see also *Diamond* v. *Charles*, 476 U.S. 54, 66-67 (1986). Respondents alleged neither that they were facing an imminent enforcement action nor that Michigan's rules of procedure impinged upon their constitutional rights. Instead, respondents assert only that they stand to lose business because of Michigan's rule against appointing counsel to assist in challenging judgments entered after a guilty plea. This Court previously has held that such a speculative allegation of harm based upon potential loss of business is insufficient to satisfy the "injury in fact" requirement for third-party standing. *Diamond*, 476 U.S. at 66-67.

Even if respondents had demonstrated an "injury in fact," however, they would not be entitled to third-party standing to allege violations of the rights of criminal defendants where *Younger* v. *Harris* stands as the only obstacle to criminal defendants raising these claims themselves. *Younger* requires

only that federal courts refuse to interfere with *ongoing* state-court criminal prosecutions. 401 U.S. 37, 41 (1971). *Younger* is thus not a complete bar to review; it merely affects the timing of such review. Allowing attorneys to institute an action under the guise of third-party standing, therefore, would eviscerate *Younger*.

II. The Sixth Circuit likewise erred in concluding that the Michigan rule is facially unconstitutional. Leaving aside the question whether criminal defendants have a constitutional right to appointed counsel to aid in the filing of a petition for leave to appeal (which they do not, as Michigan correctly argues), other Michigan rules require that criminal defendants be fully informed that they are waiving all such rights when they plead guilty. Accordingly, a defendant who pleads guilty will ordinarily have effected a knowing and intelligent waiver of any constitutional right he might otherwise have enjoyed. See *Adams*, 317 U.S. at 279. Respondents therefore cannot possibly show, as they must to succeed in their facial challenge, that there are *no* circumstances in which the Michigan rule would be constitutional. *Salerno*, 481 U.S. at 745.

STATEMENT OF FACTS

Amici adopt the statement of facts in petitioner's brief.

ARGUMENT

I. CRIMINAL DEFENSE ATTORNEYS LACK THIRD-PARTY STANDING TO BRING CLAIMS ON BEHALF OF THEIR POTENTIAL FUTURE CLIENTS, ESPECIALLY WHEN SUCH STANDING WILL ALLOW AN END-RUN AROUND RULES DESIGNED TO GIVE STATE COURTS BREATHING SPACE.

The Sixth Circuit erred in finding that the criminal defense attorney respondents have third-party standing. As a general

rule, a litigant lacks standing to assert the rights of others. See *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720 (1990) (plurality opinion). And federal courts "must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton* v. *Wulff*, 428 U.S. 106, 113 (1976) (plurality opinion); see also *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."); *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) ("[A plaintiff] must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). Judicial review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond*, 476 U.S. at 62 (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Thus, a plaintiff bears a heavy burden when attempting to litigate the rights of others.

In those rare instances in which this Court has allowed such "third-party standing," the Court has imposed a three-part test: (1) "[t]he litigant must have suffered an 'injury in fact'"; (2) "the litigant must have a close relation to the third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interest." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991). All "three important criteria [must be] satisfied" for a litigant to possess third-party standing. *Id.* Here, respondents have failed to satisfy even one of these three requirements.

A. An Attorney-Litigant Cannot Establish Standing To Challenge A State Law Based On The Alleged Violation Of A Potential Future Client's Constitutional Rights.

As an initial matter, respondents cannot establish the requisite injury in fact. The doctrine of third-party standing does not alter the basic rule that federal courts are empowered

to act only in cases or controversies. See *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623 n.3 (1989). "It is axiomatic that a litigant first must clearly demonstrate that he has suffered an injury in fact in order to assert Article III standing to sue." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 465 (1992) (internal quotations omitted).

Injury in fact, moreover, must be "actual or imminent, *not conjectural or hypothetical*." *United States* v. *Hays*, 515 U.S. at 743 (emphasis added); see also *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976) ("unadorned speculation will not suffice to invoke the federal judicial power"). It must also be concrete. As this Court put it in *Lujan*, an injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." 504 U.S. at 560 (internal quotations and citations omitted).

Lujan's requirement of concrete injury has been imported into the first two prongs of the third-party standing test, which require the litigant to demonstrate a present, real interest in this case rather than a mere conjectural or hypothetical loss of a future potential client. Thus, this Court has conferred third-party standing *only* when the litigant either faces an enforcement action, see, *e.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973) (conferring standing on a doctor that performed abortions due to threat of criminal prosecution); *Craig* v. *Boren*, 429 U.S. 190 (1976) (conferring standing on a beer seller due to the threat of criminal prosecution), alleges violation of his own constitutional rights as well as the rights of the third-party, see, *e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 433 (1998) (plurality opinion) (Stevens, J.) (conferring standing on a child to challenge a law denying her citizenship based upon the law's violation of her rights and her father's rights to equal protection of the law), or alleges that the violation of the rights of a current client has caused it economic harm. See, *e.g.*, *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1990) (conferring third-party

standing on law firm to assert that the government's forfeiture order, which left client unable to pay its legal bills, violated its client's rights).[1]

1. As to the first prong of the third-party standing test: it is well settled that third-party standing is not appropriately conferred when the litigant's claim of "injury in fact" is based upon the possible occurrence of multiple contingencies. See *Diamond* v. *Charles*, 476 U.S. 54 (1986); see also *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990) (collecting cases holding that speculative future injury will not satisfy injury in fact). Indeed, this Court has expressly rejected an argument for third-party standing based upon an assertion of potential loss of a future client.

In *Diamond*, the Court rejected the argument that a pediatrician could meet the "injury in fact" requirement merely by alleging possible future pecuniary harm from higher rates of abortions. 476 U.S. at 66. In that case, Illinois had opted not to defend one of its statutes that interfered with the right to abortion. *Id.* at 61. Mr. Diamond, a pediatrician, had been allowed to intervene in the case below to defend the constitutionality of the Illinois provision. *Id.* at 57-58. He claimed an interest in the litigation based upon the fact that should the laws in question be struck down, abortion would increase, and thus fewer children would be born, which would, in turn, cause the pool of persons seeking his services to shrink. *Id.* at 66. This Court found that such a speculative claim of "injury in fact," based upon numerous future contingencies, was insufficient to allow third-party standing. *Id.*[2]

[1] This Court has also recognized that the third-party standing rules should be more liberally applied in cases alleging violations of the First Amendment, *see, e.g.*, *Secretary of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984), but this rule clearly does not apply in this case.

[2] *Singleton* v. *Wulff*, 428 U.S. 106 (1976), is not to the contrary. In that case, this Court held that abortion doctors, asserting a woman's constitutional right to an abortion, could sue for loss of Medicaid reimbursement for abortions they performed. Although this case appears at first blush to stand for the proposition that third-party standing can arise based upon a future economic interest, this is actually not the case for two reasons. First, a majority of the Court did not find that economic harm is sufficient to confer standing. Four justices found third-party standing based upon the doctor's economic interests, while Justice Stevens found that the doctor's own constitutional rights were implicated. *Id.* at 121-22 (Stevens, J. concurring in part). But even if the plurality opinion were controlling, not only did the doctors face the future loss of income, they were being denied payments owed to them for abortions already performed. *Id.* at 109; *id.* at 113. These doctors, then, had a *present* economic interest in the litigation, and *Singleton* therefore does not speak to the question of whether a purely *future* potential economic loss is sufficient to establish third-party standing.

In this case, respondents' claimed injury is as speculative and hypothetical as the injury alleged in *Diamond*. These attorneys face no threat of criminal or civil enforcement; indeed, they have never alleged such a threat. The only consequence of the statute is that, if they should choose to represent the defendants affected by the statute, the attorneys would not be paid—i.e., these attorneys might lose potential future income. Respondents claim that the Michigan statute harms them because "it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel." Joint App. 16a (Complaint ¶ 36). That is, the respondents aver that the effect of the statute is to reduce the pool of persons seeking their services. This is precisely the type of future economic interest that this Court concluded was insufficient in *Diamond*. See 476 U.S. at 66. Thus, *Diamond* forecloses the argument that respondents have made here.

But even if respondents' argument were not expressly foreclosed by *Diamond*, it proves too much. If respondents can assert standing in this case based merely upon an allegation that the Michigan statute could lead to a decrease in their future business, then attorneys (and other professionals) could challenge *any* enactment that might reduce their future business. Such a result would render *Lujan*'s statement that plaintiffs must establish a concrete rather than conjectural

injury meaningless. See 504 U.S. at 560. Individuals would be empowered to bring cases, relying upon third-party standing, based upon tenuous chains of potential consequences. This result cannot be reconciled with this Court's precedents, which hold that third-party standing should be conferred only in a select few cases.

2. That respondents have failed to demonstrate a concrete injury is bolstered by the fact that they cannot demonstrate a "close relationship" with the criminal defendants whose rights they wish to vindicate. See *Powers*, 499 U.S. at 411 (stating that third-party standing is appropriate only when a party has demonstrated a "close relation" with the aggrieved party). Respondents cannot demonstrate a sufficient relationship in this case because they do not have an existing relationship with the criminal defendants. They rely on nothing more than a hope of a relationship with these individuals.

In cases where plaintiffs have been allowed to assert third-party standing based upon a loss of business alone (i.e., when there is not a threatened enforcement action), they have without exception complained that the violation of the rights of their *current* clients will cause them economic harm. See, *e.g.*, *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715 (1990) (attorney asserting the rights of his current clients); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1990) (attorney asserting the rights of his client). In these cases, the plaintiffs established a "close relation" with the aggrieved party by pointing to the existing relationship.

Here, by contrast, the attorneys are trying to place the cart before the horse. Though respondents are members of the defense bar and are certified to be appointed counsel, they have no relationship with any defendants affected by the Michigan statute. They were not counsel to any of the plaintiff criminal defendants, nor have the attorneys demonstrated they have been retained by any other defendants that the statute would putatively effect. Because respondents do not have an existing relationship with any individuals

currently denied counsel under Michigan's rules, they cannot allege a concrete injury. Their injury is simply a hypothetical future injury.[3] This alone makes third-party standing inappropriate here.

B. Third-Party Standing Cannot Be Based On The Delay Potentially Occasioned By *Younger* Abstention.

The third condition that must be satisfied to grant third-party standing is that there must be a "genuine obstacle" hindering the party whose rights are being asserted from asserting their own rights. *Powers*, 499 U.S. at 411; *Singleton*, 428 U.S. at 116. While there is certainly room for disagreement over how significant the obstacle must be, it is simply not reasonable to find a genuine obstacle based upon *Younger* abstention. See *Younger*, 401 U.S. at 41-46; see also *Miller*, 523 U.S. at 455 n.1 (Scalia, J. concurring in judgment) ("Our law on this subject is in need of what may charitably be called clarification"). *Younger* abstention—a doctrine created specifically to keep the federal courts out of disputes that are best handled, in the first instance, by state courts—does not

[3] In cases where this Court has recognized third-party standing on the basis of a threatened enforcement action, it has relaxed the necessity of finding an existing relationship. In *Craig*, 429 U.S. at 195, for example, this Court found that a beer vendor had standing to challenge a statute that prohibited the sale of beer to certain classes of people, though it appeared that no relationship existed between the beer seller and her potential clients. This holding appears largely based upon the notion that a pending enforcement action against the beer seller created a sufficient relationship between the buyer and seller. *Id.* ("[T]he threatened imposition of governmental sanctions might deter appellant . . . from selling 3.2% beer to young males, thereby ensuring that 'enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of the third parties' rights.'") (alteration in original). At any rate, *Craig* preceded *Powers*'s articulation of the three part test for third-party standing, and it is not clear what generalization can be drawn from *Craig*. *See Miller*, 523 U.S. at 447 (O'Connor, J. concurring in judgment) (questioning the ability to generalize from *Craig* after the Court's decision in *Powers*).

prevent state criminal defendants from raising their claims in federal court, it merely requires them to exhaust their state court proceedings first. Granting third-party standing in this case would make *Younger* abstention useless, and this Court should not accept such an end-run around such an important doctrine.

Specifically, *Younger* recognized that state courts should have the right "to try state cases free from interference of the federal courts." 401 U.S. at 43. Thus, *Younger* prevents litigants who have not concluded their state proceedings from resorting to the federal courts for relief. *Id.* at 45. *Younger* was based upon this Court's understanding that the states have important interests in administering their criminal justice systems without interference from the federal government. *Id.* at 43-45.

At the same time, however, *Younger* abstention does not stand as a permanent bar; it merely precludes a state criminal defendant from bringing a federal court action while his state-court case is pending. See *id.* *Younger*, moreover, does not preclude criminal defendants from seeking Supreme Court review of their convictions. And once a conviction becomes final, the doors to the federal courthouse open via a federal habeas corpus proceeding. See 28 U.S.C. § 2254.

In this case, the criminal defendants who initially were parties to this suit were barred from raising their claims because of *Younger* abstention. The Sixth Circuit held, correctly, that the criminal defendants were required to exhaust their state remedies—a requirement they had not yet met—and therefore should have been dismissed. *Tesmer* v. *Granholm*, 333 F.3d 683, 690-91 (6th Cir. 2003) (en banc). The Sixth Circuit then correctly noted that "[o]ur conclusion that the district court should have abstained does not foreclose any appeal by the indigents. Once state proceedings are concluded, a litigant may choose to pursue a constitutional

claim in a federal forum, and the federal court may choose to exercise jurisdiction." *Id.* at 690.[4]

Younger, then, merely limits the time within which a state criminal defendant may bring a federal court action. Thus, *Younger* cannot be considered a "genuine obstacle" because it is not a total bar against litigants ever bringing suit in federal court. Where this Court has found that a "genuine obstacle" exists, it has been a permanent obstacle, not a transitory one. See, *e.g.*, *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 684 n.4 (1977) (privacy concerns relating to abortions); *Eisenstadt* v. *Baird*, 405 U.S. 438, 446 (1972) (privacy concerns regarding contraception); *NAACP* v. *Alabama ex. rel. Patterson*, 357 U.S. 449, 459 (1958) (privacy concerns of NAACP members); *Singleton*, 428 U.S. at 108 (imminent mootness prevents the right-holder pregnant women from bringing suit); *Craig*, 429 U.S. at 192 (named plaintiff turned 21 mooting his own claim). Indeed, this Court has never concluded that a mere exhaustion requirement constitutes a "genuine obstacle" for purposes of third-party standing. Because all that is required in the present case is for the criminal defendants to first proceed through the state courts, there is no "genuine obstacle" and therefore no need to confer third-party standing on respondents to vindicate the alleged right.

Moreover, a conclusion that *Younger* abstention constitutes a "genuine obstacle" would wholly undermine the purpose of *Younger*. *Younger* teaches that litigants must wait to file suit in federal court until the conclusion of state-court criminal proceedings, and that such a delay will not damage their underlying substantive rights. In fact, where delay could damage the underlying substantive rights of the criminal defendants, this Court has carved out an exception to

[4] The same analysis will hold for any future criminal defendants—i.e., those who might be the potential, future clients of the attorney-litigants. These future criminal defendant will not be allowed to bring suits in federal court until they have exhausted their remedies in state court.

Younger. See *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 (1975) ("*Younger*, and its civil counterpart which we apply today, do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'"). Here, by contrast, respondents do not assert that delay will make it impossible for the federal courts to vindicate the rights of the criminal defendants. They simply wish to make an end-run around *Younger*'s requirement that criminal defendants exhaust their state-court proceedings before filing suit in federal court. Indeed, respondents argue that because *Younger* abstention bars the criminal defendants from making their claims now, their potential attorneys should be allowed to assert these claims via third-party standing—a position that truly turns *Younger* on its head. In short, a conclusion that Younger abstention constitutes a "genuine obstacle" would render *Younger* meaningless because defendants could achieve through third-party standing what they cannot achieve directly.

But the implications of a decision in respondents' favor are not limited to the evisceration of *Younger*. Allowing the *Younger* doctrine to be deemed a "genuine obstacle" would obviate the effectiveness of *any* prudential rule that the federal courts or Congress has adopted to allow state courts to consider the validity of their prosecutions in the first instance. A ruling for respondents would, for example, eviscerate the exhaustion requirement of habeas corpus proceedings. A litigant wishing to avoid the delay of state post-conviction proceedings could simply enlist an attorney to file a case alleging third-party standing in the federal courts. If *Younger* abstention suffices as a "genuine obstacle" then why would not the exhaustion requirement of 28 U.S.C. § 2254? Surely,

third-party standing cannot be used as a method for simply avoiding all procedural rules that state criminal defendants do not like.[5]

Put simply, respondents have failed to meet the requirements of third-party standing because they have failed to demonstrate that they have a cognizable interest in this case and because *Younger* abstention cannot reasonably satisfy the "obstacle" requirement for third-party standing.

II. BECAUSE RESPONDENTS CANNOT SHOW THAT THE MICHIGAN STATUTE IS UNCONSTITUTIONAL IN ALL OF ITS APPLICATIONS, THEIR FACIAL CHALLENGE NECESSARILY FAILS.

The Sixth Circuit also erred in holding that the Michigan statute's denial of appointed counsel to aid in the drafting of a petition for leave to appeal was unconstitutional on its face.[6] As aptly demonstrated by the State of Michigan, neither the text of the Constitution nor this Court's precedents create a right to appointed counsel for that purpose.

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[5] Respondents have also asserted that the criminal defendants face a "genuine obstacle" to asserting their claims in state court because they lack counsel to aid them in asserting these claims. This argument is a red herring. Respondents are criminal defense attorneys and could have chosen to represent any number of criminal defendants in their state court proceedings to aid them in challenging this statute. Instead, respondents opted to initiate this federal court action—presumably at their own expense. Respondents desire to avoid state court appears to be the only reason to file this suit rather than to represent defendants in their ongoing state-court proceedings. There simply is no "genuine obstacle."

[6] In light of this Court's ruling, in *McKane* v. *Durston*, that criminal defendants do not have a constitutional right to an appeal, 153 U.S. 684, 687 (1894), respondents cannot assert that Michigan's decision not to grant an appeal as of right violates the Due Process Clause of the Fourteenth Amendment. Instead, respondents must argue that Michigan's decision not to appoint counsel to aid criminal defendants in filing petitions for leave to appeal violates the Equal Protection Clause and Due Process Clause.

But even if the Constitution created such a right, its existence would not doom the Michigan statute. Respondents here make a facial challenge to the constitutionality of the Michigan statute, requiring them to demonstrate "that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745 (stating that a party making a facial challenge to a statute must demonstrate that there are no circumstances under which the statute would be constitutional).

Although respondents have attempted to meet this high standard by characterizing Michigan's rule as denying defendants the right to counsel, the statute does no such thing. Instead, as shown below, Michigan has presented defendants with a choice—they may plead not guilty, in which case they will be afforded all of their procedural rights (including their right to counsel on appeal) or they may decide to forgo all of these rights by pleading guilty. Indeed, Michigan's rules of court require that a criminal defendant be fully informed of the consequences of pleading guilty—including that he will forfeit any right that he might have to appellate counsel—before the trial court may accept a guilty plea. See Mich. Comp. Laws Ann. § 770.3a(4); Mich. Ct. R. 6.302(B)(5), (6).

In light of these rules, respondents can succeed in this action only if they can demonstrate (1) that criminal defendants have a right to appointed counsel to aid in filing an application for leave to appeal and (2) that criminal defendants in Michigan have, as a class, not knowingly and intelligently waived this right by pleading guilty. But the validity of a waiver can only be determined on a case-by-case basis. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Accordingly, respondents cannot succeed in their facial challenge to Michigan's statute because they cannot demonstrate that it will in every application result in a constitutional violation.

A. The Sixth Circuit Ignored The Settled Principle That A Criminal Defendant May Waive His Right To Counsel As Long As He Does So Knowingly, Intelligently, And Voluntarily.

The Sixth Circuit's decision ignored the fact that, even if criminal defendants have a right to the aid of counsel in filing petitions for leave to appeal, that right can be waived.

1. In *Johnson* v. *Zerbst*, this case faced the question of whether criminal defendants had waived their right to counsel. 304 U.S. at 464. The Court noted that a criminal defendant was free to waive his right to counsel so long as he did so knowingly and intelligently:

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case. . . .

Id.; see also *Adams*, 317 U.S. at 279 (stating that a defendant can waive his right to counsel so long as he does so "with eyes open").

Moreover, this Court has held that a criminal defendant may waive his right to counsel knowingly and intelligently even without complete knowledge. In *United States* v. *Ruiz*, this Court held that a prosecutor need not provide all potential impeachment information to a criminal defendant before he enters a guilty plea. 536 U.S. 622, 625 (2002). Although the prosecutor would have been forced to disclose this information had the case gone to trial, the failure to disclose it did not render the defendant's guilty plea unknowing. As the Court put it:

> [T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would

> likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.

Id. at 629.

Similarly, in *Iowa* v. *Tovar*, 124 S.Ct. 1379 (2004), the Court faced the question of what warnings were required to make a waiver of counsel at the guilty plea stage knowing and intelligent. The Court rejected the notion adopted by the court below that the trial judge was required to warn defendants of the specific uses that an attorney could serve. See *id.* at 1389. The Court concluded instead that, on the facts of that case, the warnings given to the criminal defendant, including the trial court's provision of the ordinary guilty plea litany, were sufficient to inform the defendant of his right to counsel and to provide him with sufficient information to knowingly and intelligently waive his right to counsel. *Id.* at 1389-90.

In short, this Court's precedents establish that a criminal defendant will be held to have knowingly and intelligently waived his right to counsel so long as he is provided reasonable information about his right prior to waiving it.

2. At the same time, a criminal defendant may waive his rights through his actions. Indeed, this Court has previously held that the very act of pleading guilty necessarily requires a defendant to waive numerous procedural rights: "When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees." *Ruiz*, 536 U.S. at 628-29 (citing *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969)). And in *Boykin* v. *Alabama*, this Court noted that "[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." 395 U.S. at 242. Accordingly, the Court held that, in pleading guilty a defendant necessarily

waives his right to trial by jury, his right against self incrimination, and his right to confront his accusers. *Id.*

Accordingly, it is beyond dispute that criminal defendants knowingly and intelligently waive these rights when they plead guilty so long as they are informed of these rights and informed that by pleading guilty they will waive them. See *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

B. Michigan Court Rules Ensure That A Guilty Plea Will Ordinarily Constitute A Knowing And Intelligent Waiver Of A Defendant's Right, If Any, To Appellate Counsel.

Michigan procedure, moreover, ensures that criminal defendants, as a condition of pleading guilty, will ordinarily be required to make a knowing and intelligent waiver of their right to appeal and to the aid of counsel in filing a petition for leave to appeal. Accordingly, the Michigan statute forbidding the State to provide counsel for such purposes does not deprive defendants of any rights in case in which such warnings are properly given.

Michigan Court Rule 6.302(B)(6) provides that a trial court must inform the defendant that "if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies." This warning is given expressly to every criminal defendant before he is allowed to enter a plea of guilty. Thus, a criminal defendant who pleads guilty will ordinarily be fully informed that by entering that plea he is waiving any right that he might have to post-conviction counsel.

Given that these defendants are fully informed of their rights and of the consequences of pleading guilty, the very act of pleading guilty constitutes a knowing and intelligent waiver of their rights to counsel. See *Brady*, 397 U.S. at 748 (holding that a defendant knowingly and intelligently waives his trial rights by pleading guilty). Moreover, in light of this

Court's recent precedents in *Tovar* and *Ruiz*, respondents cannot demonstrate on a *per se* basis that criminal defendants must be given some broader warnings about the usefulness of counsel. Thus, the Michigan rules of procedure ensure that criminal defendants will generally make a knowing and intelligent waiver of his right to counsel by pleading guilty.

C. A Rule Requiring A Waiver Of Constitutional Rights As A Condition Of Some Other Privilege Cannot Be Facially Unconstitutional Where, As Here, There Is A Reasonable Likelihood That Some Such Waivers Will Be Knowing And Intelligent.

Given these facts, the Michigan statute cannot be deemed facially invalid.

1. As with virtually all waiver issues, the question whether any particular defendant has knowingly and intelligently waived his right to counsel—if such a right exists—requires a fact-specific inquiry. As this Court has held: "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Zerbst*, 304 U.S. at 464.

This fact-specific inquiry makes a facial challenge to the constitutionality of the Michigan statute inappropriate. It makes it impossible for respondents to carry their burden of establishing "that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745.

2. Finally, there are strong policy reasons for rejecting facial challenges to rules such as the Michigan statute at issue here. States have a strong interest in obtaining guilty pleas and in ensuring the finality of the resulting convictions. As this Court recognized in *Brady*, "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process." 397 U.S. at 750. The Court went on to

explain that guilty pleas offer very real advantages for the state:

> the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Id. at 752. The Court concluded that it could not hold that a system in which the government offers the defendant an incentive to plead guilty somehow renders the waiver of his right to trial involuntary. *Id.* at 753. Ultimately, then, *Brady* stands for the principle that states may encourage defendants to plead guilty and may attempt to finalize their convictions so long as they do not attempt to coerce a defendant to waive his constitutional rights.[7]

In this case, Michigan has effectuated its interest in the finality of guilty pleas by mandating both that a defendant may not appeal as of right after he enters a guilty plea and that a defendant who pleads guilty will not receive appointed counsel to aid in filing a petition for leave to appeal. See

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[7] This Court has also similarly recognized the States' interest in the finality of guilty verdicts in the analogous context of collateral attacks:

> "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea."

Timmreck, 441 U.S. at 784 (quoting *United States* v. *Smith*, 440 F.2d 521, 528-29 (7th Cir. 1971) (Stevens, J., dissenting)); *see also Zerbst*, 304 U.S. at 468-69 (applying a presumption of regularity to final judgments).

Mich. Const. of 1963, art. I, § 20 ("an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court."); Mich. Comp. Laws Ann. § 770.3a(1) (stating that a criminal defendant who pleads guilty will not receive appointed counsel). There can be no doubt that Michigan was free to remove the right to appeal from a guilty verdict. See *McKane* v. *Durston*, 153 U.S. 684, 687 (1894).

In light of Michigan's strong interest in ensuring the finality of guilty pleas, there can likewise be no objection to the State's decision to condition the acceptance of a guilty plea on the defendant's agreement to waive his right to counsel. Because Michigan continues to give defendants the choice of whether to waive their right to counsel—by allowing defendants to plead not guilty—it has not violated these defendants' rights by the mere enactment of the rule at issue here.

* * * *

In sum, the Sixth Circuit's decision to allow respondents to challenge Michigan's rule in federal court represents an improper end-run around *Younger* v. *Harris*, and should be reversed. Likewise, the Sixth Circuit's decision that the Michigan rule is unconstitutional is not only wrong as a matter of equal-protection doctrine, but also ignores the fact that the rule amounts to nothing more than a requirement that criminal defendants waive any right they may to appellate counsel when they make the choice to plead guilty. Because the validity of such a waiver can only be determined on a case-by-case basis, the Sixth Circuit's decision to allow respondents to proceed with a facial challenge should also be reversed.

CONCLUSION

The decision by the United States Court of Appeals for the Sixth Circuit should be reversed.

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